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IN THE

Supreme Court of the United States

October Term, 1952
No. 406

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,

Petitioners,

vs.

WALTER B. SCOVILLE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the District Court for the Southern District of California, holding that an agreement to make payments out of the production of an oil well created no property interest in the well, and was not cognizable by the Court in distributing a fund paid for the well by the Government in a condemnation proceeding.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by U. S. C. Title 28, Section 1254(1).

The case was decided by the United States Court of Appeals for the Ninth Circuit on May 23, 1952. A petition for rehearing was denied on June 25, 1952. On September 23, 1952, pursuant to application by counsel for the petitioners, an order was made by this Court extending the time for filing petition for writ of certiorari to and including October 23, 1952.

Questions Presented.

The questions presented by this petition are:

1. Where the appellate courts of a state have determined that a certain type of instrument confers a property right upon the holder, is a federal court free to follow a contrary decision by this Court, in passing upon a similar instrument, and to hold that it is only a personal covenant?

2. Is it a part of the judicial duty of a federal court in distributing an award which has been paid into court for property taken in condemnation proceedings to consider and pass upon all claims of persons who had an interest in the property condemned?

Statement of the Case.

The respondent, Walter B. Scoville, was the owner of royalty interests in an oil well being drilled in Southern California. He induced the petitioners to invest $5,000.00 to be used for completion of the well. [R. 1191, *et seq.*] In return respondent agreed to assign to petitioners a part of his royalty. He further agreed that the money invested by them was to be returned two for one out of the first fifteen per cent of gross production from the well. [R. 118-119.] This has been referred to in the case as "the two-for-one agreement." It is primarily with the so-called "two-for-one agreement" that this petition is concerned.

The well was successfully completed in December of 1938. Fifteen per cent of the gross proceeds of oil and gas produced during the period of its operation exceeded the sum of $10,000.00, payable to petitioners under the two-for-one agreement.

Disputes arose between the respondent, Scoville, and his associates in the venture. Litigation ensued, as a result of which Scoville and those allied with him were ousted from possession and management of the well. No payments were ever made to Scoville on his royalty interests, or to petitioners, either on their assigned royalty interests, or on the two-for-one agreement. [R. 1216-1217.]

In 1942 the United States, on behalf of Reconstruction Finance Corporation, condemned, for use as a gas storage reservoir, the entire oil field in which the well is located.

The well is known as Treasure Well No. 8. In the condemnation suit a jury trial was had for the purpose of valuing the various interests in the property condemned. Based upon expert testimony as to the present value of estimated future production, a valuation of $194,500.00 was placed by the jury on the total working interests in Treasure Well No. 8. This was the value of all interests in the well, except the landowner's royalty.

In a further proceeding, the trial court, sitting without a jury, divided this award among the owners of the working interest, these being the Reconstruction Finance Corporation, which had acquired the interest of the lessee, and various holders of participating royalty interests, being or deriving from assignments made by the lessee, Treasure Company. The respondent, Scoville, as the owner of a 16 per cent participating royalty interest, assigned to him by the lessee, was held to be entitled to the sum of $30,672.00. The petitioners Bullen and Hayward, as the owners of two one per cent (1%) participating royalty interests, assigned to them by Scoville, were awarded the sum of $1,917.00 for each 1% royalty, or an aggregate of $3,834.00. [R. 1301.]

These participating royalty interests, under which the holders had the continuing right to receive a percentage of the net proceeds of sale of oil and gas produced from the well, after payment of operating expenses, were held by the trial court to be interests in real property under the law of California [Concl. of Law IV, R. 151], and this was affirmed by the Court of Appeals. [R. 1305 and

1323]; but the Court of Appeals held that the royalty owners had no right to have the value of their interest paid to them in this proceeding. [R. 1323 *et seq.*]

The trial court held that the two-for-one agreement was a personal covenant on the part of Scoville, and did not entitle the petitioners to any part of the award. [Finding XXV, R. 146, and Concl. of Law VII, R. 152.] This ruling was affirmed by the Court of Appeals. [R. 1314.]

Opinion Below.

The opinion of the United States Court of Appeals is reported in 197 F. 2d 1, and is also printed in Volume IV of the record. [R. 1298, *et seq.*]

The opinion deals with many questions not involved here and the record is voluminous. However, there is no dispute about the facts, and the portion of the opinion dealing with the rights of petitioners under the two-for-one agreement is brief. The statement of fact on this point in the opinion is as follows:

> "B. THE SCOVILLE-HAYWARD-BULLEN AGREEMENT.
>
> Scoville entered into an agreement with the Bullens and Haywards whereby they contributed $2500.00 per couple to be used in completing the well. Scoville agreed to assign to each couple from his royalty interests a one (1) per cent interest. He also agreed that the money so invested was to be repaid two to one out of the first fifteen per cent of gross production from the well. This agreement has been referred to as the 'Two-to-One Agreement.' While the plan for obtaining this money had the approval of the

Adamant and Treasure companies, neither was a party to the agreement. The trial court held that the agreement was a personal undertaking by Scoville which did not entitle the parties to any share of the award." [R. 1311.]

The ruling on the two-for-one agreement of which the petitioners complain is as follows:

"We dispose of the claim arising from the 'Two-to-One Agreement' by stating that the trial court was correct in holding it to be a personal undertaking on the part of Scoville which gave the Bullens and Haywards no interest in the well or production from it. In this respect, the contract was akin to the contract under consideration in *Helvering v. O'Donnell,* 1938, 303 U. S. 370. There, O'Donnell had owned one-third of the capital stock of the San Gabriel Petroleum Company. On January 9, 1918, he sold the stock to the Petroleum Midway Company, Ltd. As consideration, the Midway Company agreed to pay to him one-third of the net profits from the development and operation of the oil and gas properties then owned by the San Gabriel Company and which the Midway Company agreed to acquire. That acquisition was made. The properties acquired were developed and operated and one-third of the profits thus derived were paid to O'Donnell to August 4, 1926. O'Donnell claimed deduction for depletion. And the question arose whether he had an interest 'in the oil and gas in place.' Mr. Chief Justice Hughes answered in the negative:

> 'The agreement to pay respondent one-third of the net profits derived from the development and operation of the properties was a personal covenant and did not purport to grant respondent an interest in the properties themselves. If there were no net profits, nothing would be payable to him. No trust was declared by which respondent could claim an equitable interest in the *res.*' (*Helvering v. O'Donnell,* 1938, 303 U. S. 370, 372.)

It will be noted that the payment for the stock was to be made out of property to be acquired and developed. So it is fair to infer that the stock was used for the purpose of acquiring the additional field and developing it. Nonetheless, the Court held that the undertaking was a personal one to repay money and carried no claim of an equitable interest in the property thus acquired and developed." [R. 1314.]

Specification of Error.

1. The Court of Appeals erred in holding that the two-for-one agreement was a personal undertaking by Scoville which did not entitle the petitioners to any interest in the oil rights or in the award which was substituted for those rights; and in failing to hold that the obligation to pay petitioners $10,000.00 from production should have been satisfied out of Scoville's share of the award.

2. The Court of Appeals erred in refusing to allocate and distribute in this proceeding to all holders of oil rights their respective shares of the award made by the jury for such rights.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The United States Court of Appeals Has Decided an Important Question of Local Law in a Way Which Conflicts With Applicable Local Decisions.

The decision by this Court in *Helvering v. O'Donnell,* relied on by the Court of Appeals for its ruling on the legal effect of the two-for-one agreement, involved a technical question of a depletion allowance under the federal income tax law, and might be distinguished on that ground. To the extent that the case purports to decide what rights are given by an agreement to pay over a percentage of the proceeds of sale of oil from specific properties it is not in accord with decisions by the California courts; and there would seem to be no doubt that California law governs in this case.

> *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938).

The highest court of California has uniformly held that instruments which purport to give the holder a share of the oil from specific property, or a share of the proceeds of sale of such oil, whether gross or net, are specifically enforceable against the promisor, to the extent of his interest in the property. The cases hold that such agreements are not merely personal covenants, but that they give a property interest. All decisions by the California Supreme Court, and all decisions by the District Courts of Appeal in which a petition for hearing by the Supreme Court has been denied, have held, without exception, that any such obligation is binding upon one who purchases the

property from the promisor with notice of the outstanding agreement.

Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733, 24 P. 2d 971 (1933);

Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788 (1935);

Standard Oil Co. v. J. P. Mills Organization, 3 Cal. 2d 128, 43 P. 2d 797 (1935);

Dabney-Johnston Oil Corporation v. Walden, 4 Cal. 2d 637, 52 P. 2d 237 (1935);

Schiffman v. Richfield Oil Co., 8 Cal. 2d 211, 64 P. 2d 1081 (1937);

Gavina v. Smith, 25 Cal. 2d 501, 154 P. 2d 681 (1944);

Recovery Oil Co. v. Van Acker, 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), and the same case after retrial, 96 Cal. App. 2d 909, 216 P. 2d 483 (1950) (hearing denied by Supreme Court).

The theory by which this result has been reached has varied, but the holdings have been the same over a period of about twenty years, and there has never been a decision to the contrary by the Supreme Court of the state.

Some of the early cases were decided on the theory that the sale of oil to be produced passed title under the doctrine of potential possession of personal property. For example, in the first case cited above, *Western Oil & Refining Co. v. Venago Oil Corp.*, the lessee of an oil lease, one Miller, rented from the appellant certain pipe which he used in drilling an oil well. He agreed to pay a cash rental, and, as a further consideration, assigned to the appellant 2 per cent of all oil and gas to be produced. He also assigned

to appellant an additional 10 per cent of such oil and gas, as security for payment of the cash rental. This latter assignment, it will be seen, is quite similar to the two-for-one agreement in our case. When a sum certain was paid (the cash rental in that case, the $10,000.00 in our case), the holder would have no further interest in production under that particular agreement. Whether these assignments were of the gross or net production does not appear. Under the cases it would be immaterial.

After these assignments or agreements were made, the oil lease was transferred to a corporation which had notice of them, but refused to honor them. By an odd coincidence, the distinguished judge who tried that case is the same one who wrote the opinion in the case at bar, the Hon. Leon R. Yankwich, then a state court judge, now presiding judge of the United States District Court for the Southern District of California, sitting *pro tem.* in this case as a member of the Court of Appeals for the Ninth Circuit.

The holding of the Supreme Court of California is epitomized by the statement at page 737 of the opinion in 218 Cal.:

> "We cannot accede to the trial court's view that the instruments were merely personal undertakings of Miller to pay appellants percentages of the proceeds of oil produced by him individually."

There follows a discussion of the potential possession theory, which is no longer law in California since the adoption of the Uniform Sales Act in 1931. (*Callahan v. Martin*, 3 Cal. 2d 110 at 128.) The latter case held that an oil royalty created by the owner of the fee was

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rty, an incorporeal hereditament
non law *profit a prendre*. Later,
an interest in real property, an *Oil Co., supra*, where the royalty
in the nature of the common law the lessee of an oil lease, the
in *Schiffman v. Richfield Oil Co.*, result as in *Venago* and *Callahan*
agreement was made by the less case was simply that the royalty
Court reached the same result as red in equity as the owner of a
although the theory in this case wa he should be entitled to specific
holder should be considered in eq said at page 228 of the report
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in 8 Cal. 2d:

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> "The equitable doctrine of s
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> and sell land, arose from the
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> subject-matter of the contract
> assignments the uncertainty
> the oil to be produced render
> tract unique."

Court was still uncertain as to
its view that royalties in what-
created by landowner or lessee
In *La Laguna Ranch Co. v.*
114 P. 2d 351 (1941), the Court,
s of various types, and after ad-
hat ordinarily a royalty holder,
ight of possession and hence can-
profit a prendre, says, at page 139:
sts thus created have been consid-
and, on the same page, ". . .
cope of all such royalty interests
all should be considered equally
interests in real property . . ."

As late as 1941 the Court w
theory, but unshaken in its view
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> ered *sui generis*"; and, on t
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> to be incorporeal interests i

We have discussed theory because it is stressed in the opinion by the Court of Appeals. It seems to us, however, that the important consideration is that the actual holdings by the high court of California have been absolutely uniform, and contrary to the result arrived at by the Court of Appeals in the case at bar, at least in so far as the two-for-one agreement is concerned.

Finally, in 1947 there came before a California District Court of Appeal an instrument precisely the same in substance as the two-for-one agreement. This was in the case of *Recovery Oil Co. v. Van Acker,* 79 Cal. App. 2d 639, 180 P. 2d 436 (1947). After a retrial, the case came up a second time, 96 Cal. App. 2d 909, 216 P. 2d 483, and a petition for hearing by the Supreme Court of California was denied.

In the *Van Acker* case, the holder of a prospecting permit on land in California executed a document reading in part as follows:

> "The undersigned hereby assigns . . . to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil . . . produced, saved and sold from the said premises . . . until such time as said assignee shall have received the sum of Twenty Thousand Dollars ($20,000)." (79 Cal. App. 2d at 640.)

In the case at bar, the agreement which the respondent Scoville made with the petitioners reads in its material parts as follows:

> "These funds, $5,000 . . . to be repaid two for one out of production, it being understood and agreed that said two for one out of production is to be repaid out of the first 15% of gross production from the said well." [R. 119.]

The same argument was made in the *Van Acker* case as was made here, *i. e.,* that the document was merely a personal promise. The Court said (79 Cal. App. 2d at 642, 180 P. 2d at 438), after noting that the instrument assigned only a portion of the proceeds of sale of the oil:

> "From this they argue that the assignment can be construed to be no more than a promise on the part of the assignor to pay the assignee a sum of money out of a specific fund. . . ."

The Court did not deny that this was the extent of the undertaking, but held nevertheless that the instrument created an interest in the real property and that the plaintiffs, who had succeeded to the property, and were chargeable with knowledge of the agreement, could not quiet their title against it.

In view of these decisions, and the mandate of this Court in *Erie Railroad Co. v. Tompkins,* petitioners submit that the United States Court of Appeals, relying upon the decision of this Court in *Helvering v. O'Donnell,* or otherwise, was not justified in holding that the two-for-one agreement was merely a personal covenant which gave the petitioners no property interest.

II.

The Court Below Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In the briefs and the argument, the *Van Acker* case was cited and relied upon as the chief ground for the proposition that under California law the two-for-one agreement must be held to create a property interest. The Court of Appeals did not refer to this case in its disposition of the rights of petitioners to payment under the two-for-one agreement, although it is mentioned in another part of the opinion. [R. 1305.] The accepted course of appellate procedure would seem to call for the opinion to distinguish a case apparently in point, but which the Court declined to follow.

As noted in the quotation from the opinion hereinabove set out, the main ground of the Appellate Court's decision in refusing to recognize any rights of the petitioners under the two-for-one agreement was its conclusion and reliance upon the decision by this Court, in *Helvering v. O'Donnell*, that the agreement should be construed as a personal covenant only, giving no rights *in rem*. In a footnote [R. 1315], and in some subsequent discussion [R. 1310-1317], other grounds are intimated, but we submit that none of them sustains the decision. As we read the opinion, they are as follows:

(1) The agreement was not made by the lessee. (The trial court had held [R. 140] and the Court of Appeals affirmed the holding [R. 1311] that the lessee, Treasure Company, was not a party to the agreement or bound by it.) This is immaterial in so far as petitioners' claim against Scoville is concerned. He had a 10 per cent roy-

alty interest. It is true that this was a participating royalty, *i. e.*, one which gave him the net proceeds of the designated percentage of the proceeds of the oil, after payment of a like percentage of operating expenses. This would not give him the right to convey, as security or otherwise, 15 per cent, or any per cent, of the gross production. However, it is fundamental that one who attempts to convey more than he owns is bound to the extent of what he does own.

This doctrine of estoppel was applied to the holder of a participating royalty interest in a leading California case, *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937). There a Massachusetts trust, known as Monrovia Oil Company, was organized to acquire and develop an oil lease. In order to finance the drilling of a well, the trustees sold participating royalties. In this manner they disposed of 100 per cent of the oil rights held by them, but some of the royalty was issued to themselves for their services. The well was successfully brought in. Large distributions were made to royalty holders. Later, production difficulties developed, and the well was closed down, the trustees having no means of raising the money to rehabilitate it. Some time after that an oil company became interested in the lease, and the trustees sold it, making no mention of the outstanding oil rights, and pocketing the proceeds of sale.

Although the oil royalties were not recorded, it was found that the purchaser had actual knowledge of them, and the Court held that the purchaser was bound to honor them and to pay them their share of the production.

The question then arose of whether the purchasing oil company got anything, since the outstanding royalties represented 100 per cent of the lessee's oil rights. At the

time of the sale, however, one of the trustees still owned some of the royalty, and the Court held that this interest would pass to the purchaser by estoppel. The Court said at page 222 of the report in 8 Cal. 2d:

> "In the circumstances shown he would be estopped to show that such rights as he had at the time of the transfer to the Brownmoor Company did not pass to it. . . ."

Although this vital point was made in the briefs, and stressed in the argument, it is not mentioned in the opinion of the court below.

(2) In the footnote [R. 1315] it is perhaps suggested that the two-for-one agreement is distinguishable from the *Van Acker* case, although that case is not mentioned, on the ground that the instrument in our case is in the form of an agreement, while in the *Van Acker* case the undertaking was couched in the form of an assignment. This we submit is not a distinction of substance. Equity regards that as done which ought to be done, and a specifically enforceable agreement creates a property interest. The California courts, in dealing with oil royalties, speak of them indiscriminately as assignments or agreements, whatever the form might be; and it is, of course, true that, since in the normal case the royalty holder has no right of possession or management, the royalty, though it may be expressed as an assignment, cannot amount to anything but an agreement to pay over or cause to be paid over the proceeds of sale of a certain percentage of the oil.

It should be noted in this connection that no evidence was taken by the trial court to aid it in interpreting the two-for-one agreement. The Appellate Court was therefore in the same position as the trial court in construing

this document. The agreement is in the form of a letter from the petitioner, Herschel Bullen, to George Halverson [R. 118-121], which was agreed to by Scoville and others. The original was lost, and the signature of Scoville only is on the copy which was introduced in evidence. Reference to the document will show that it contains no personal agreement whatever by Scoville to repay the money. His undertaking was that it would be repaid out of the first 15 per cent of gross production from the well. If this well was a failure, it was provided [R. 120], that certain other oil interests would be substituted. This, of course, did not become operative, since the well was successful. The petitioners are therefore in the position of one who holds a mortgage, or rather a trust deed, to secure the payment of a sum of money, where there is no right to any deficiency judgment. This would seem to be the antithesis of a personal obligation.

Similarly, the instrument involved in the *Van Acker* case apparently created no personal obligation to pay. The rights of the holder there were succinctly stated by the Court in 96 Cal. App. 2d at 912:

> "Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed."

(3) The discussion in the second paragraph of the footnote [R. 1315], of stock rights does not seem to be applicable either to the two-for-one agreement or the agreement to assign participating royalties as contained in the letter agreement. [R. 118.] Warrants evidencing the right to subscribe to stock are mere options, but it is

fundamental that when such rights are exercised and the money paid, the issuance of a stock certificate is not necessary to create the stockholder relationship. In this case, formal assignments of the participating royalties were issued because of certain requirements laid down by the Commissioner of Corporations in connection with their original issue. No additional document was asked for or needed to cover the two-for-one payment, and, even if it had been, the maxim to the effect that equity regards that is done which ought to be done, would apply. This principle was actually applied in this case to an agreement made by Treasure Company to assign a 2½ per cent interest to Wynn. [R. 1310.] The two-for-one agreement was in no sense a mere option. The money of the petitioners was paid over and used in the completion of the well. [Finding XXIV, R. 145.]

(4) The Court refers to a state court adjudication that Scoville, *et al.*, had no right of management, and says [R. 1316],

> "This adjudication fixed the measure of their rights as they existed at the time the letter to the Bullens and Haywards was written."

This is a mistake of fact on the part of the Court. The fact which deprived Scoville and his associates of any right of management, as adjudicated by the state court, was the bringing in of the well for less than 200 barrels per day. The well went on production in December of 1938. (*Scoville v. de Bretteville,* 50 Cal. App. 2d 622 at 626.) The letter agreement containing the two-for-one agreement is dated September 27, 1938 [R. 118], and it was by the use of the petitioners' money that the well was put on production. [Finding XXIV, R. 145.] Therefore, Scoville did have ostensible authority at the time he

made the agreement with the petitioners, but we are not now quarreling with the Court's finding that the agreement was not binding on the lessee, Treasure Company. Our contention is that Scoville is estopped to deny that the two-for-one agreement attaches to his royalty interest, and that petitioners are aggrieved by the failure of the Court below to deal with this point.

(5) The Court cites certain cases from other jurisdictions [R. 1316], and distinguishes them on formal grounds which do not appear to be material, and have been hereinabove discussed, as well as on the ground that they were based upon local law. We recognize the latter as a valid distinction, but it emphasizes the Court's failure to distinguish *Van Acker*. It may not be amiss to note that one of these cases, *Phillips Petroleum Co. v. Gable,* 128 F. 2d 943 (1942), is on all fours with the case at bar, and appears to have been decided upon general principles rather than any peculiarities of Oklahoma law. The document involved there was in form an agreement, and appears to have been made by a royalty holder. An equitable lien was imposed upon his interest to secure the agreed payment.

(6) Some California cases are cited [R. 1316-1317], and are distinguished on the ground that they were based on the theory of potential possession of personal property, which is no longer law in California. *Van Acker* is not among the cases cited, and of course could not be, since it was decided long after the change of the law in 1931, and on the theory of the later cases that interests of the kind here involved are real property, incorporeal hereditaments. Here again the emphasis of the court below upon the theory of the California cases, rather than their holdings, is to be noted.

III.

The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

So far as petitioners have been able to find, this is the first case in which there has been a judicial determination of the rights of oil royalty holders when the land has been condemned by the Government.

The court below, while acknowledging that the owners of oil rights, including royalty holders, have an interest in real property under the law of California, denied to royalty holders the right to be paid in a condemnation proceeding the value of their property, taken by the Government in such proceeding. That Court permitted the immediate payment to the Reconstruction Finance Corporation of the lessee's share [R. 1322], but held up payment of the royalty holders' share pending the determination of accounting suits between them and Treasure Company. [R. 1323 *et seq.*]

This was a restriction imposed by the Court of Appeals. The trial court determined what share of the award should go to each holder of a percentage of the working interest, whether held by the Reconstruction Finance Corporation, as successor of the lessee, or by royalty owners; and it ordered immediate payment. [R. 155.] Although there was a dispute between the Reconstruction Finance Corporation and the royalty holders as to the share each should get, no one appealed from the part of the judgment which directed payment.

The discrimination in the right to payment appears to have been based upon three grounds:

(1) An analogy between participating royalty holders and stockholders of a corporation. [R. 1306, 1324.]

(2) The pending suits between some of the royalty holders and the lessee. [R. 1324, *et seq.*]

(3) The technical difference between the title of a lessee and that of a royalty holder. [R. 1323.]

None of these grounds appears to be valid.

It is true, as the Court says, that a royalty is a security under the state blue sky law, but that is because it is defined as such by the statute. Royalties are also securities under the federal law, the Securities Act of 1933. This surely does not make them like shares of stock for all purposes, and does not, we submit, justify the conclusion of the Court that there must be, or even that there can be, a dissolution of some assumed organization of which they are members, in the same way as a corporation is dissolved. We submit that there is no basis for the following statement of the Court:

> "So, a court can no more divide the proceeds of the sale of a leaseholder's interest among the lessee's participating royalty holders, than it could divide the proceeds among the stockholders of a corporation prior to dissolution." [R. 1324.]

The fact that royalty holders have rights of ownership in the underlying property furnishes a clear reason to differentiate them from stockholders.

The pending suits to which the Court refers are not dissolution proceedings. They are actions in which certain participating royalty holders sued the operating lessee, Treasure Company (neither these petitioners nor the Reconstruction Finance Corporation, successor in interest of Treasure Company, are parties), for an accounting of its operations and the payment to them of their share of the net proceeds of sale of the oil and gas produced in the past, *i. e.*, prior to the condemnation. The fund to be

disposed of here is an award which was arrived at by an estimation of the present value of the future production [R. 537], which was taken away from the lessee and the participating royalty holders by the action of the Government in condemning the land.

As to the distinction in title, the Court indicates that royalty interests which have come from the lessee's interest are not "severable" [R. 1306], and says that they "are not capable of division." [R. 1323.] It is true that rights of a royalty holder, unless he owns 100% of the oil rights in a particular property, are not held in severalty, but are owned in common with the lessee and other royalty holders, and it is also true that such rights are not capable of partition in kind. It would seem clear, however, that they can be partitioned, like any other property held in co-tenancy, by a sale of the property and a division of the proceeds among the co-tenants in accordance with their respective fractional interests.

What happened here was a forced sale. The Government acquired the title, in fee simple absolute, to a large area of land. Valuations were then made, by agreement or by trial, of various bundles of rights which had theretofore existed in the land. One such bundle, valued by a jury, was in the language of the verdict:

> "H-1, W-I—Being the total working interests in Treasure Company Well Treasure No. 8—$194,500.00." [R. 65.]

There is no dispute among the parties that what was valued by this part of the verdict consisted of all the oil rights held by the lessee, Treasure Company, and the participating royalty holders, whose interests were derived by direct or mesne assignments from the lessee. Specifically, it was 80.6% of the total oil rights, the land-

owners' reserved royalty of 19.4% having been separately valued or settled. [R. 1165.]

There is also no question that the property valued consisted of oil rights without giving any separate consideration or valuation to the right of the lessee to such possessory rights of the surface as might be necessary to take the oil from the ground, or to its right of management. It is conceded that this possessory and management right was owned in severalty by the lessee, but that is of no consequence here.

The distinctions between the legal rights of the lessee and royalty holders might be important in other connections; and might even make it advisable in a condemnation case for the jury to value royalty interests separately from the operator's interests. Even if that was done, however, it would furnish no reason to defer payment to the respective owners of their shares of the awards; and it was not done for Treasure Well No. 8.

In the case at bar the testimony of the experts valued the oil rights as a whole, the landowner's percentage was deducted, and the remainder was the value given to the oil rights held by the lessee and its assigns. [R. 779, 868-869.] The jury lumped together the oil rights which the lessee had assigned and those which it retained, and made one award for the working interest. The subject matter of the two was the same for the purposes of this case, and as the California Court said in 8 Cal. 2d at 227:

> "The subject-matter of royalty assignments is specific—an undivided interest in the oil to be produced under a specific lease or from a specific well during the term of the lease, or an interest in the proceeds of such oil."

No objection was made by anyone to that procedure, and the valuation judgment [R. 67-79], is now final. The lessee and the participating royalty holders, having been treated as tenants in common of the oil rights so valued, are therefore tenants in common of the award.

It is submitted that the distinction introduced by the Court of Appeals is artificial and arbitrary in this case, and results in imposing an unwarranted burden upon the constitutional right of the participating royalty holders to be paid for property which has been taken for public use, by requiring them, as a condition of receiving payment, to litigate matters having nothing to do with the rights at issue here.

On this branch of the case the petitioners speak not only for themselves, as the holders of two 1% participating royalties, but for the other participating royalty holders, and specifically for respondent Walter B. Scoville. The petitioners here seek to subject his royalty interest to the obligation of the two-for-one agreement, and the rights of petitioners are therefore prejudiced by the action of the Court of Appeals in deferring payment to the respondent Scoville. It would seem that it was the duty of the Court not only to divide the fund among the various persons owning the undivided fractional interests therein, but also, in doing so, to take note of any liens or charges, whether existing against the entire fund or fractional parts thereof.

As hereinabove noted, the respondent Scoville is estopped to deny that the obligation to pay to the petitioners $10,000.00 out of 15% of gross production is a charge against his 16% participating royalty interest (*Schiffman v. Richfield Oil Co.*, 8 Cal. 211, at 221-222), and the charge created by the two-for-one agreement is in the

—25—

nature of a trust deed under the Ca under the California law. (*Recov-*
ery Oil Co. v. Van Acker, 96 Cal. *ker*, 96 Cal. App. 2d 909 at 912.)*

While we have been unable to fin unable to find direct authorities on the problems here raised, a good disc[ed, a good discussion of the general subject by a District Judge is cont[udge is contained in *United States v. Certain Parcels of Land*, 40 Fe *Land*, 40 Fed. Supp. 436 (1941). The Court there said at page 443: at page 443:

> "It is also to be noted that the oted that the effect of the taking by the authorized authority is t uthority is to vest both title and possession in the government government and therefore presumably to transfer all claims b all claims both of ownership and lienors, whether legal or equi legal or equitable, to the fund, at least so far as such liens and uch liens and charges may exist in favor of persons named or ot named or otherwise bound by the proceeding."

The Court also said at the same pa t the same page:

> "When the government depos ernment deposits the estimated just compensation in the registry o the registry of the court, and takes the property, it has, subject has, subject to possible exceptions hereafter discussed, discharged sed, discharged its obligation, and is not directly concerned with t cerned with the distribution of the fund. The duty to make ty to make proper distribution is thereby imposed upon the cou upon the court, in accordance with well-established principles of principles of the judicial function." (Citing cases.)

It is submitted that the Court of t the Court of Appeals has failed in the discharge of this duty to make duty to make proper distribution.

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*The right of petitioners to have the p ers to have the payment due to them under the two-for-one agreement made from ment made from Scoville's share of the award would seem to be somewhat analo be somewhat analogous to the rights of one who holds a deed purporting to convey porting to convey in severalty a part of a larger area of land which is owned in hich is owned in common, the deed being executed by only one of the tenants i of the tenants in common. Such a deed conveys the interest of the grantor, and the grantor, and the holder is not only a proper but a necessary party in a suit party in a suit between the co-tenants to partition the larger area. (*Gates v. Salm* a. (*Gates v. Salmon*, 35 Cal. 576 (1868).)

Conclusion.

Because of the expense involved, and the doubt as to whether this Court would consent to review the case, the petitioners had hoped to find some other remedy. An action against Scoville in the state court was considered, but no assertion of a property right could be made there, since the judgment of the federal court, even though contrary to the state law, would be binding upon the state court in the particular case, under the principle of *res judicata*. An action upon the theory of damages for breach of contract, if not barred by the statute of limitations, would be futile because of respondent's insolvency. The petitioners are hopeful, therefore, that the importance of the case to investors in oil royalties, and to the oil industry, particularly to the small operators who frequently aid their financing by agreements with suppliers and others to make payments out of oil, as well as what appears to be a disregard by the Court below of local law (including the novel feature of using a decision by this Court to support such disregard), will be considered sufficient reasons for this Court to review the case and to right the injustice which petitioners believe has been done to them.

Respectfully submitted,

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WILLIAMSON, HOGE & CURRY and
FULTON W. HOGE,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1952

No. .....

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,

Petitioners,

vs.

WALTER B. SCOVILLE,

Respondent and Appellee.

BRIEF OF RESPONDENT AND APPELLEE.

Statement of the Case.

The Petition for Writ of Certiorari sets forth a correct statement of the case as far as it goes.

In addition thereto Treasure Company (the assignor of all its assets to Reconstruction Finance Corporation), sold and received payment for the entire *production* of the oil well *prior* to its seizure in condemnation, and respondent Scoville received none of said moneys.

The Treasure Company, six years *after* the seizure of the well in condemnation *and before* the jury trial on valuation, transferred all its interests in the leasehold together with its other properties to the Reconstruction Finance Corporation. These other litigants had no knowledge of said assignment until after the jury trial.

Opinions Below.

The opinions of the United States Court of Appeals [R. pp. 1296-1326] affirmed the decision of the District Court, reading as follows:

> "The enforcement of the so-called 'two for one' agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter, and is not a matter for settlement in the within case." [R. p. 152—Fdg.-Conclusion VII.]

The opinion of the United States Court of Appeals also affirmed the decision of the District Court, reading as follows:

> (1) "Bullen and wife and Hayward and wife have no equitable liens upon the moneys due the parties as hereinbefore set forth from the jury award and verdict." [R. p. 147—Fdg. XXVIII.]
>
> (2) "The moneys due to all the parties in this action are due because of their respective interests in the leasehold, known as the Fletcher leasehold." [R. p. 147—Fdg. XXIX.]
>
> (3) "Walter B. Scoville made an assignment of a participating royalty of 1 per cent interest in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises * * * to Bullen and wife and also a like 1 per cent to Hayward and wife." [R. p. 141—Fdg. XVII.]
>
> (4) The assignments of 1 per cent royalty to Bullen and wife and a 1 per cent royalty to Hayward and wife "were assignments not only of oil, gas and other hydrocarbon substances produced, saved and sold from the well but were also assignments of interests in the leasehold and conveyed interests in real property." [R. pp. 142-143—Fdg. XVIII.]

(N. B.—The decision of the District Court and of the United States Court of Appeals held that the "two for one agreement" was a personal contract and carried no interest in the well or the leasehold, but that the 2 per cent royalties did carry an interest in the leasehold.)

* * *

The Court of Appeals held that the royalty owners had no right to have the value of their interest paid to them in this proceeding. [R. p. 1326.]

The District Court held as follows:

"That the Clerk of this Court is ordered to *forthwith* pay out of the Registry of this Court to each of the following parties the sum of money set opposite their respective names:

(Names and amounts including Scoville and Bullen and Hayward.)" [R. p. 155—Judg. III.]

Questions Presented.

Where the state courts have declared that a bonus contract such as the petitioners' "two for one agreement" in the case at bar is a personal covenant and does not purport to grant petitioners an interest in the leasehold, are not the Federal Courts bound by the state law and required to rule to the same effect *as they have in this case?*

Where the United States District Court has ordered the jury award in a condemnation proceeding to be paid forthwith to the royalty holders, and where the United States Court of Appeals affirms such judgment, has the United States Court of Appeals the right to order a portion of the award paid immediately to the Reconstruction Finance Corporation as assignee of one of the litigants but requires the other litigants to bring to judgment *both*

a federal accounting action and a state court accounting action against the *assignor* of the Reconstruction Finance Corporation, which assignor is now insolvent by reason of that very assignment?

N. B.—Why should respondent be compelled to bring to judgment an accounting action for his share of the profits of the enterprise earned prior to its seizure by the Reconstruction Finance Corporation, against Treasure Company, which company has no assets after assigning its interests in the leasehold to Reconstruction Finance Corporation?

The witnesses for Reconstruction Finance Corporation testified in the case at bar that $3.30 per 1 working interest per month was a sufficient charge for operating the well.

Why isn't the Reconstruction Finance Corporation bound by the testimony of its *own witnesses* and thus required to deduct the operating charges and remit to the royalty holders the net profits of the well—instead of aiding the Treasure Company to defraud the royalty holders. [Reconstruction Finance Corporation Expert Witnesses—Dr. Dodge, R. pp. 336-337, 815; Mr. Stolz, R. p. 389.]

Dr. John F. Dodge, a Government expert witness, testified as follows:

> "However, that became of no importance since the operating charges which we, I should say I—Mr. Sheldon and I, in making this appraisal, assumed to be the operating cost in the future, were below a

> $10.00 per cent per month, which created a difference, or at least one of the differences between these various classes of per cents. Our operating costs which we postulated in making our estimate of the future value of this property were *very much less* than $10.00 per month per cent, which was the breaking line between at least certain classes of these working interests of which you speak * * * *and is not governed or influenced by any possibly inflated idea of costs that might have been existing in the past."* [Jury Trial, R. pp. 336-337.]

Specifications of Error.

1. The Court of Appeals did not err in holding that the "two for one" agreement was a personal undertaking and that same did not entitle petitioners to any interest in the oil rights and hence gave them no lien upon Scoville's share of the award.

2. The Court of Appeal did err in releasing a portion of the award to Reconstruction Finance Corporation and in compelling the other litigants to bring to judgment certain state and federal accounting actions against the *Treasure Company which* had assigned all its assets to the Reconstruction Finance Corporation and was thus insolvent.

3. The Court of Appeals did err in not correcting the division of the award in accordance with the verdict of the jury.

4. The Court of Appeals did err in *not* granting a lien of *royalty holders* against the fund substituted for the land.

ARGUMENT.

I.

The Two for One Bonus Agreement Is Not an Oil Royalty Hence the Decision Is Not in Conflict With Local Law.

The petitioners state that:

> "The United States Court of Appeals has decided an important question of local law in a way which conflicts with applicable local decisions."

The respondent Walter B. Scoville agrees fully with said statement in that the Court of Appeals denied the holders of royalty interests in this oil leasehold the right to an *equitable lien* against the fund of money substituted for the leasehold by the condemnation proceedings.

However, the claim of petitioners Bullen and Hayward to the effect that their Two-for-One bonus contract constitutes an oil royalty is fallacious.

The attempt of petitioners to claim an equitable lien by reason of the ownership of a bonus contract is not tenable.

The Two-for-One Agreement Is Not an Oil Royalty and Hence Its Ownership Confers No Equitable Lien Under the Laws of the State of California.

The cases cited by petitioners on pages 9 to 13 of their brief do not apply to a Two-for-One bonus contract.

The Two-for-One Agreement *could not possibly* be a royalty because there are only one hundred oil royalties in a lease.

In the case at bar the landowners' royalty amounted to 19.4 units. [R. p. 746.]

The working interests amounted to 80.4 units.

This comprised all of the *possible royalties* that could be outstanding upon this or any leasehold.

The Two-for-One Agreement is *simply a contract* but not a royalty.

There is a vital distinction between the assignments construed in the case of *Recovery Oil Co. v. Van Acker,* 79 Cal. App. 2d 639, and the same case found later in 96 Cal. App. 2d 909. (Cited pp. 9, 12, 13, 14, 16, 19 and 25 of Bullen and Hayward Petition for Writ of Certioari.)

The *assignments* construed in those two cases read as follows:

> "On November 20, 1928, A. Bruce Frame and his wife executed the following written assignment:
>
> 'That, referring to that certain Oil and Gas Prospecting Permit, Visalia Serial 010101, M. A. Knapp, Assignee, and referring to the Operating Agreement dated May 2, 1928, executed by said M. A. Knapp to the undersigned, covering the following described premises: (Description.)
>
> 'The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (*15% of the oil, gas and other hydrocarbon substances* produced, saved and sold from the said premises so covered by said Operating Agreement (less amount used in operations on the premises), until such time as said assignee shall have received the sum of Twenty Thousand Dollars ($20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end.' (Emphasis added.)

On April 10, 1929, N. E. Grable executed the following instrument:

'IN CONSIDERATION of the receipt, by the undersigned, of Ten and no/100 ($10.00) Dollars, N. E. Grable, unmarried, of Los Angeles County, State of California, does hereby remise, release, assign and quitclaim to Ada M. Crawford of Los Angeles County, State of California, the following: *This instrument is intended to transfer all right, title and interest now held by the Grantor* in and to one-half (½) *of the interest acquired* by the Grantor under that certain instrument dated November 20, 1928, and recorded November 27, 1928, in Book 272, Page 431 of Official Records of Kern County, California, without any warranty or assurance of title whatsoever.'" (Emphasis added.) (79 Cal. App. 2d 640.)

In the *Van Acker* case, *supra,* the interest created by the assignments constituted a *direct proportion* of the oil, gas and other hydrocarbon substances.

The second assignment above, being the one from Grable to Crawford, states:

"This instrument is intended to transfer all right, title and interest *now held* by the grantor * * *."

Bullen and Hayward received two units of royalty out of the total of 100 units possible in an oil lease *at the time* they paid their money. Such being the case, the contract to pay for "Two for One *out of* oil" was in the nature of a bonus and, of course, their 2 per cent royalty was benefited by their investment just as much in proportion as the other 98 unit holders in the leasehold.

Furthermore, in the *Van Ac*
royalty *was included* within the
of royalty in the leasehold.

Acker case the 15 per cent
e 100 per cent or 100 units

We quote from page 910
Recovery Oil Co. v. Van Acke
as follows:

of the Final Decision of
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> "Various partial assign
> made to others and in 193
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Acker case as follows (96 Cal.

final decision of the *Van*
App. 2d 909-911):

> "A judgment in favor of
> on appeal (Recovery Oil C
> App. 2d 639 (180 P. 2d
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> *Grable to Ada M. Crawfo*
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436)) for reasons not in-
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ct to *operating agreement*
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ch of Knapp's *interest* in
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f these transfers and as-
ded and plaintiff had con-
nd as a conclusion of law,
insofar as this property is
valid assignment now held

> and owned by Ada M. Crawford whereby she is the owner of 15 per cent of the proceeds of the oil, etc., saved and sold from the premises until such time as she shall have received $10,000.00, whereupon her interest shall terminate and be at an end. Judgment was entered accordingly. The plaintiff appealed from the entire judgment, but prosecuted this appeal only from that portion thereof which sustains the claim of Ada M. Crawford." (Emphasis added.)

The above clearly indicates that there can be no royalty interests in excess of 100 per cent or of 100 units.

When Bullen and Hayward received the written assignment of 1 per cent *each* said assignment read, in part, as follows:

> "* * * sell, assign, set over, transfer and convey to Herschel Bullen and Mary H. Bullen as joint tenants * * * one per cent participating royalty interest *in all oil,* gas and other hydrocarbon substances produced, saved and sold from the following described premises, * * *." [See Finding XVII; R. p. 141.]

Bullen and Hayward knew by *comparing* their respective assignments of a 1 per cent participating royalty with the *bonus* contract that the two were *entirely different* and that while the 1 per cent assignment of a royalty gave them an equitable lien, as it transferred to them a capital *investment* in the production of oil and gas the bonus contract gave them no such rights.

Each contract is governed by the intent of the parties to said contract.

This Bonus Contract Was Never Intended to Be a Participating Royalty Interest, Otherwise It Would Have Been so Worded.

Bullen and Hayward quoted from the case of *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, at page 18 of their brief in the United States Court of Appeals.

The basis of the decision in said case was an oral grubstake agreement, such agreements having always given the party who grubstaked the other party a definite interest in the *"res"* or property obtained.

We quote from the *Austin v. Hallmark Oil Co.* case:

> "On November 2, 1934, in accord with the *obligation imposed* by the grubstake agreement of July 1st, Porter assigned to Austin one-half of all income, profits, moneys and credits to become due or payable to him under the terms of his contract with the Hallmark Oil Company, Inc." (P. 723.)
>
> * * * * * * * *
>
> "The interest created by an assignment depends upon the *intention of the parties* (La Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132 (114 P. 2d 351, 135 A. L. R. 546); National R. Co. v. Metropolitan T. C., 17 Cal. 2d 827 (112 P. 2d 598); Callahan v. Martin, 3 Cal. 2d 110 (43 P. 2d 788, 101 A. L. R. 871)), and while that intention is determined primarily from the terms of the instrument, the language of the assignment must be construed in the *light* of the *facts and circumstances* of the *particular case*. (Schiffman v. Richfield Oil Co., 8 Cal. 2d 211 (64 P. 2d 1081); Adamson v. Paonessa, 180 Cal. 157 (179 P. 880).) (13) In view of this rule it is clear that the instrument in the present case was intended to transfer fifty per cent of the interest retained by Porter under the agreement of October

of that interest. *By*
30th, regardless of the nature , Austin was equita-
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ceived a penny of said production m

has definitely ruled
The United States Supreme Court hether we call it a
that a contract such as this one (w uitable lien.
bonus or not), does not create an eq

nell, 303 U. S. 370
In the case of *Helvering v. O'Don*
(1937), the Supreme Court said:

> "The question is whether Resp ndent had an inter-
> est, that is, a capital investment in the oil and gas
> in place."

The case turned upon the point that:

> "The agreement to pay Respondent one-third of the net profits derived from the development and operation of the properties was a *personal* covenant and did not purport to grant Respondent an interest in the properties themselves. If there were no net profits, nothing would be payable to him. No trust was declared by which Respondent could claim an equitable interest in the *res.*" (303 U. S. 372.)

The Appeal Court of California denied an equitable lien in a similar contract situation.

We quote:

> "The complaint was based upon a written instrument alleged to have been executed by John Weston Havens in 1903 in words and figures as follows:
>
> " 'Berkeley, Cal. Jan. 6th, 1903.
>
> " 'To whom it may concern, and especially my executor—
>
> " 'It is agreed that I shall pay out of the sale of Block 22 Shattuck Tract number 5, the macadamizing bill of $617.41 and grading bill of $349.72.
>
> " 'J. W. HAVENS.'
>
> "From the prayer of the complaint and the briefs, it appears that plaintiff was seeking to have it declared that said instrument created an *equitable lien* upon said real property and upon the proceeds of any sale of said property which might be made at any time.

"(1) Appellant contends that his complaint stated a cause of action for such declaratory relief and that the trial court erred in sustaining the general demurrer thereto. *We find no merit in this contention.* The instrument in question manifests no intention to create a lien upon the real property. It appears to be an informal memorandum executed for the purpose of evidencing the personal obligation of the maker. Said obligation was to be paid by the maker or his executor, to whom a claim might be presented, but payment was deferred until the time of sale of the property. At most it was a mere agreement to pay a debt out of a particular fund, when received, but *such an agreement does not create a lien even upon such fund.* (Maier v. Freeman, 112 Cal. 8 (44 Pac. 357, 53 Am. St. Rep. 151); 37 Cor. Jur., p. 314, sec. 15; also p. 318, sec. 21.)" (Emphasis added.)

Morrison v. Havens, 24 Cal. App. 2d 504 (1938). (Supreme Court denied petition for hearing March 25, 1938.)

The Mere Fact That Bullen and Hayward Received an Assignment of 2 Royalty Units Put Them on Notice That Their Contract Calling for Two-for-One Out of Production Was Not a Royalty Interest but a Plain Contract for a Bonus.

We cannot agree with Bullen and Hayward that the Court of Appeals "* * * was not justified in holding that the two-for-one agreement was merely a personal covenant which gave the petitioners no property interest." (Pet. for Writ p. 13.)

We submit:

The Two-for-One Agreement is not a royalty agreement.

II.

The Failure of the Court Below to Discuss the Van Acker Case in Reference to the Bonus Agreement Was Not Error

Petitioners state that:

> "The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

While respondent agrees with the above contention insofar as the United States Court of Appeals ignored the law of the State of California, yet there is no estoppel created against respondent Scoville as contended by petitioners, Bullen and Hayward.

It has been stipulated in the case at bar that Treasure Company handled all the proceeds from the production of the well prior to the time of its seizure by the Government in the condemnation proceedings. [R. pp. 1235, 1236.]

In view of that stipulation, if anyone is liable for the payment of the two-for-one "out of production" it would be the *Treasure Company alone.*

Respondent Scoville did not handle any of the funds of the production of the well, and under rulings of the state courts of California he was prevented from handling the funds and hence he could not possibly have paid the two-for-one *"out of production."*

* * *

At page 17 of the petition for writ of certiorari Bullen and Hayward state:

> "Reference to the document will show that it contains no *personal* agreement whatever by Scoville to

repay the money. His undertaking was that it would be repaid out of the first 15 per cent of gross production from the well."

The above *admission* of petitioners, when considered with the added fact that Scoville handled none of the funds from the production of the well, clearly indicates that, there being "no personal" liability on the part of Scoville to repay the money, there can be no lien against whatever funds belonged to him from the condemnation award and hence there can be no estoppel against him.

III.

The Court Below Decided an Important Question of Federal Law Erroneously.

We agree with petitioners' contention, at page 20 of their petition, that "the Court below has decided an important question of federal law which has not been, but should be, settled by this Court."

The last paragraph of the Opinion of the Circuit Court reads as follows:

> "The cause is, therefore, remanded to the trial court with direction to stay the execution and enforcement of the judgment as to the appellants other than Reconstruction Finance Corporation (as set forth in Paragraphs II and III of the judgment) until the actions pending in the state and federal court are determined, or the parties settle them and agree upon a manner of division of the award. The trial court will retain power to hold such further hearings as may be called for by the determination or settlement of the pending actions. In all other respects, the judgment stands affirmed." [R. p. 1326.]

There is no doubt but that the above ruling, requiring determinations of other cases, is *beyond the jurisdiction* of the United States Court of Appeals, and especially is the portion of the ruling suggesting that the *parties agree* upon the manner of the division of the award.

Conceding the error of the above ruling, its correction by the Supreme Court will *not aid* petitioners in their attempt to claim a lien against respondent Scoville's interest in the award.

Respondent submits that the attempt of the Circuit Court to restrain disposal of the funds can be safely disregarded by the District Court.

At page 25 of their petition for writ of certiorari Bullen and Hayward cite the case of *Gapes v. Salmon,* 35 Cal. 576 (1868), to sustain their petition that Scoville is estopped to deny that the obligation to pay to the petitioners $10,000.00 out of 15 per cent of gross production is a charge against his 16 per cent participating royalty interest and the charge created by the two-for-one agreement is in the nature of a trust deed under the California law.

We fail to find in the record *any pledge* of the interests of Walter B. Scoville as guaranteeing fulfillment of the two-for-one agreement.

In view of the fact that Walter B. Scoville handled none of the proceeds from the production of oil, there can be no lien upon any of his interests, since he did not misapply any of the proceeds.

Gapes v. Salmon, 35 Cal. 576, 587, 588 (cited p. 25 of the Bullen and Hayward petition), held as follows:

> "The rule upon this point is, that one tenant in common cannot convey any specific part of the land so as to prejudice his co-tenant." (Cases cited.) (P. 587.)

In the case at bar Scoville did not convey anything in the two-for-one bonus agreement, hence the citation of the above case is not in point even by analogy.

We submit that any interests held by Walter B. Scoville were free from any pledge as collateral and hence not chargeable with the "two-for-one" agreement.

There Is No Doubt but That the Opinion of the United States Court of Appeals Is in Error on Two Important Rulings, Which Rulings Were Contrary to the Evidence and to Equity.

I.

The first error was the failure of the United States Court of Appeals to reverse the trial court's mathematical error.

The exact wording of the jury's verdict and award pertaining to Treasure No. 8 leasehold was, as follows:

"H-1
W-I being the *total* working interests in Treasure Company Well Treasure No. 8— $194,500.00"
[R. p. 65.]

The evidence before the jury, by *stipulation* established the fact that the "total working interests in Treasure Company Treasure Well No. 8" was only 80 and 6/10 interests and *not* one hundred interests—and that the re-

maining interests of 19 and 4/10 belonged to the landowners. [R. p. 746.]

It is self-evident that there can never be more than 100 1 per cent units or interests in any oil lease.

The jury rendered no verdict upon the valuation of the 19 and 4/10 landowners' interests.

Yet the trial court divided the jury award into 100 parts and gratuitously handed to the Reconstruction Finance Corporation the 19 and 4/10 portion of the award—which never existed under the verdict.

One hundred and ninety-four thousand, five hundred dollars divided by 80 and 6/10 working interests makes 1 working interest of the value of $2,413.15.

Under the mathematical error $194,500.00 divided into 100 parts makes 1 working interest of the value of $1,945.00 only.

This is contrary to the jury verdict, especially since the difference in value was *given* to the Reconstruction Finance Corporation and taken away from Adamant Co., Scoville, Wynn, and Bullen & Hayward.

A lessee never owns 100 1 per cent working interests in a leasehold. If he did he would own the whole property and there would be no lessor.

It is error to force an owner of one working interest, out of a total of 80 and 6/10 working interests covered by the jury verdict, to accept one hundredth part of the verdict and thus lose $468.15 on each working interest.

Query: Why did the United States Court of Appeals refuse to reverse this error of the trial Court?

The error robbed Adamant Co., Scoville and Wynn of approximately $22,000.00 and *gave* it to the Reconstruc-

tion Finance Corporation, and it robbed Bullen and Hayward of $936.30 for the benefit of Reconstruction Finance Corporation.

II.

The second error was the failure of the United States Court of Appeals to reverse the trial Court and to allow the holders of working interests an equitable lien upon that portion of the jury award belonging to Treasure Company and its belated assignee Reconstruction Finance Corporation.

It was stipulated that Treasure Company received the sum of $205,411.69 from the operation and sale of the products of Treasure Well No. 8. [R. pp. 1235-1236.]

Treasure Company paid none of this sum of earnings from the oil well to Adamant Co., Scoville, Seeple, Wynn, Bullen or Hayward—even though they owned a total of 49 working interests in the well.

The Answer filed by Adamant Co., Scoville and Wynn on December 8, 1943, in this condemnation suit brought by the Reconstruction Finance Corporation *put said Reconstruction Finance Corporation upon notice* of the claim of 47 working interests against Treasure Company and the leasehold for their portion of the profits of the well. [See Answer—R. pp. 19-20, 21, 22-23.]

Approximately 5½ years later and on May 31, 1949, the Reconstruction Finance Corporation received by assignment all the assets of the Treasure Company [See Contract of Assignment—Adamant, *et al.*, Ex. 1—February 23, 1950], and left the Treasure Company insolvent.

Under federal condemnation procedure the money deposited in Court is substituted for the land taken.

The law of California is as follows:

> "The payment of royalties out of a production of an oil well is a continuing obligation, and the recipient of those royalties has an interest *in the land* so long as her right to royalty continues." (Citing *La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132, 114 P. 2d 351.)
>
> *Recovery Oil Company v. Van Acker,* 96 Cal. App. 2d 909-912, April, 1950 (Supreme Court denied hearing June 8, 1950).

We submit that if working interests (royalty holders) have an interest in the land until the payment of their royalties then that interest is transferred to the fund substituted in the condemnation action.

The United States Court of Appeals failed to mention the above California case and *its* law, but based its denial of an equitable lien upon the false premise that there was not a written contract creating the lien or if there was then it was ambiguous.

Apparently the United States Court of Appeals was uninformed of the principal of equity that equitable liens are frequently created by *implication* in the absence of a written contract.

The United States Court of Appeals admits our ownership of the working interest or royalties. The California law establishes our interest in the land until the payment of the income from our royalties and hence the lien upon the fund is by *implication.*

Said lien is not based upon any ambiguous contract as argued by the United States Court of Appeals in its opinion. [R. pp. 1313-1320.]

See *Ketchum v. St. Louis,* 101 U. S. 306, for an enlightening discussion of equitable liens and applicable to the case at bar.

It must be pointed out that Treasure Company *assigned* all its assets to the Reconstruction Finance Corporation, and hence any judgment in an accounting action, either in the state court or in the federal court, would be worthless as same could not be collected against a corporation which has no assets. Treasure Company alone received the revenue from production amounting to $205,411.69. And yet the Circuit Court requires us to bring those two accounting cases to judgment against Treasure Company, an insolvent.

Under the above circumstances, an equitable lien can be created by implication, in accordance with the decision of the United States Court of Appeals, Sixth Circuit, as follows:

> "In the absence of an express contract, a lien based upon the *fundamental maxims of equity* may be *implied* and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. One may, by *manifest intent* and agreement, create a security for the discharge of his obligation and another discharging such an obligation, if not a volunteer, has the right to look to the fund for repayment."
>
> *Cleveland Clinic Foundation v. Humphreys* (1938), 97 F. 2d 849, 121 A. L. R. 163 (C. C. A. 6th) (Writ of certiorari denied in 305 U. S. 628, 83 L. Ed. 403, 59 S. Ct. 93).

The United States Court of Appeals for the Eighth Circuit held that monies advanced under oral agreement

for the payment of future del iveries of coal created an equitable lien and charge enforc eable against the estate in the hands of the trustee in bank ruptcy.

Atchison T. & S. F. R. y. v. *Hurley* (1907), 153 Fed. 503 (C. C. A. 8th).

The United States Court of Appeals had before it Defendants' Exhibit D, which was an agreement dated April 5, 1938, and executed between Treasure Company, the Adamant Company and Walter B. Scoville.

This agreement provided, in Paragraph 7 thereof, that all of the working interests belonging to Treasure Company (the assignor to the Reconstruction Finance Corpopany (the assignor to the Recany and Scoville were subject to all operating, maintenanc ration) and to Adamant Compe and finishing charges on Treasure Well No. 8 and any succeeding wells.

When Treasure Company as signed all its assets to the Reconstruction Finance Corpor tion, said corporation had knowledge of this provision a same was introduced at the condemnation trial in whi h the Reconstruction Finance Corporation was party plaintiff.

Yet the United States Court of Appeals releases all the moneys belonging to Treasur Company and requires Adamant Co., Scoville, Wynn Bullen and Hayward to proceed against Treasure Com any in certain accounting actions in the Federal and Sta te courts before they can draw down their portions of t e jury award.

Any accounting judgments a gainst Treasure Company are worthless as Reconstructio Finance Corporation has taken all its assets.

Conclusion.

If this Supreme Court will reverse the United States Court of Appeals and rule that the owner of an oil royalty has an interest in the land under California law (*Recovery Oil Co. v. Van Acker, supra*), and which interest is transferred to the award substituted for the land in eminent domain proceedings, then both petitioners and respondent will have a lien against the funds belonging to Treasure Company and released by the United States Court of Appeals to the Reconstruction Finance Corporation, which corporation had notice of the fact that Treasure Company had cheated us of our profits from the well.

The Two-for-One Agreement is only a personal undertaking and creates no lien upon any funds.

Petitioners admit that they have not recovered a judgment upon the Two-for-One Agreement and hence have slept upon their alleged rights.

Whenever petitioners Bullen and Hayward either renew a state court action on their Two-for-One Agreement, or start a new action and serve a summons upon Walter B. Scoville, he will plead that the statute of limitations has run against their claim and he will plead other meritorious defenses to any attempt of petitioners to enforce their Two-for-One Agreement against him.

Petitioners themselves indicate, at page 26 of their petition, that they fear the statute of limitations as a defense to any action based on the Two-for-One Agreement.

Respectfully submitted,

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1952.

No. 406.

HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,

Petitioners,

vs.

WALTER B. SCOVILLE,

Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT.

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PETITIONERS' REPLY TO BRIEF OF RESPONDENT.

I.

Respondent's Arguments That the Two for One Agreement Is Not a Royalty, and That It Is a Bonus, Are Beside the Point.

The argument of the respondent Scoville is a play on words. He assumes that the only possible kind of royalty is one which represents a continuing ownership of a part of the oil, the total of which is 100%, and then maintains that the two for one agreement could not possibly be a royalty, presumably because it is not one of that kind, but is limited in duration to the time when $10,000.00 shall have been paid. One of the royalties involved in

anything else, has been held by the high court of California, for twenty years, to give the holder thereof a property interest. (See pages 8 to 13, inclusive, of the petition.)

Respondent would have the court interpret his agreement as if it read merely "these funds, $5,000.00 . . . to be repaid two for one." He attempts to completely disregard the words which immediately follow those above quoted, and which read "out of production, it being understood and agreed that said two for one out of production is to be repaid out of the first 15% of gross production from the said well." (Page 13 of the petition.)

Respondent makes much of the point that the well was operated by the lessee, Treasure Company, and that the money from production did not come into his hands. This is true. While he did have possession at the time the two for one agreement was made, he lost it shortly after the well was put on production (page 18 of the petition). However, this is immaterial. He made the contract and is responsible for its performance. *Furthermore, as a result of the condemnation, he will come into possession of money which stands in place of his share of future production.*

It is, of course, true, as respondent says, that the interest created by any document depends upon the intention of the parties. There was, however, no evidence in this case of what the parties meant, except the language in the agreement itself, and where such agreements have been construed by the California courts over a period of years to give a property interest in oil to be produced, it would

seem that the parties should be deemed to have contracted in the light of such decisions, and the fact that the Supreme Court of the United States takes a different view of them would seem to be immaterial.

II.

Respondent's Criticism of the Remainder of the Opinion of the Court of Appeals Is Well Founded.

It is quite true, as respondent points out at page 20 of his brief, that the District Court deprived the petitioners of $936.30, and gave this money to Reconstruction Finance Corporation, for no apparent reason whatever except an error in simple arithmetic, and this error was affirmed by the Court of Appeals, the only reason stated being that it was a "pragmatic treatment" of the matter [R. 1321].

The amount involved, as far as these petitioners are concerned, was not large enough to be of serious consequence, and they did not raise the point in their petition because it was not desired to complicate the case, but to the extent that it is still open, they join with the respondent on this point.

For the same reason, the petitioners did not press the point that the participating royalty holders should be entitled to an equitable lien upon the interest of Treasure Company, and hence upon the interest of its assignee, Reconstruction Finance Corporation, to secure any moneys due to them from past production, which the operating lessee failed to pay over to them, as it should have done, on their participating royalties.

Western Oil & Refining Co. v. Venago Oil Corporation, 218 Cal. 733 (cited and discussed at pages 9 and 10 of the petition), and the only royalty involved in *Recovery Oil Co. v. Van Acker* (1947), 79 Cal. App. 2d 639, 180 P. 2d 436; (1950), 96 Cal. App. 2d 909, 216 P. 2d 483 (cited and discussed at pages 12 and 13 of the petition), were of this limited type.

They are essentially security transactions whereby the owner of the oil rights, or a part thereof, assigns all or a part of such oil rights to another to secure the payment of a certain sum of money. In our case, there was an investment rather than a loan in the ordinary sense, because, as noted at page 17 of the petition, there was no personal obligation on the part of Scoville to pay the $10,000.00, yet it was a security transaction, an elementary concept which should not give the respondent as much trouble as it seems to do. The fact, as pointed out by the respondent (page 17 of his brief), that there is no specific language of pledge or hypothecation is, of course, immaterial.

In other jurisdictions, such an agreement has been held to create an equitable lien upon the portion of the oil rights which stands as security for payment of the money. *Phillips Petroleum Co. v. Gable* (1942), 128 F. 2d 943, cited at page 19 of the petition. In California there is a transfer of the legal title to the oil rights, for the time being, in the nature of a deed of trust, to secure the obligation. See the quotation from the *Van Acker* case at page 17 of the petition.

We have, therefore, in the two for one agreement, more than an equitable lien. It is a legal estate given for security, and which by estoppel, if not by express terms, transferred such of the oil rights as respondent Scoville had.

Any discussion of equitable liens, in general, or California law on that subject, *e.g., Morrison v. Havens,* cited at page 14 of respondent's brief, has therefore no application to the two for one agreement. It is governed by a California case dealing with precisely the same kind of interest *in oil rights,* the *Van Acker* case. The only differences between that case and the case at bar have been carefully noted by the petitioners at pages 14 to 17, inclusive, of their petition herein, and the respondent makes no attempt to meet the points there made. It should be noted that respondent has not cited any state court decisions to support his statement on page 3 of his brief that "The state courts have declared that a bonus contract such as petitioners 'two for one agreement' in the case at bar is a personal covenant . . ."

The respondent maintains, apparently, that the two for one agreement could not give a property interest, because, as he claims, it was a bonus. Why this should make any difference he does not explain, nor does he indicate how he arrives at the conclusion that it was a bonus. In the agreement with Scoville the petitioners got two things: (1) a 2% participating oil royalty representing the continuing ownership of the net proceeds from 2% of the oil to be produced; and (2) 15% of the gross proceeds of the oil produced, which was to be paid to them until they had received the sum of $10,000.00. There is no more reason for saying that the $10,000.00 payment was a bonus than to say that the participating royalty was a bonus.

The name which was given to the rights created by the agreement in any event is immaterial. Both constituted an agreement to pay over the proceeds of sale of oil and gas to be produced from a specific property, and any such agreement, whether it is called a royalty or a bonus or

In conclusion, we submit that the respondent entirely fails to meet the argument of the petitioners that the two for one agreement necessarily, under the California authorities, creates a property interest in the petitioners.

Respectfully submitted,

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